BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MELISSA A. BRAUN	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,072,426
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the April 2, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Rodney C. Olsen of Manhattan, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 2, 2015, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

In his April 2, 2015, preliminary hearing Order, ALJ Moore concluded:

> Claimant's preliminary hearing requests are **CONSIDERED** and **DENIED**. Claimant has failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with Respondent. The evidence establishes, more probably than not, that Claimant's accident was caused by a personal condition or risk personal to her, or as a result of an idiopathic cause.

Claimant asserts her automobile accident arose out of and in the course of her employment with respondent. She contends her accident resulted from a work risk and was not the result of a personal risk or an idiopathic cause.

Respondent asks the Board to affirm the preliminary hearing Order.

The sole issue is: did claimant's accidental injuries arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant is a social work specialist who works out of respondent's Hays office. Her duties require her to travel to several counties and make home visits. On November 5, 2014, claimant had home visits in Ellis and Russell counties. That morning, claimant got up between 5:30 and 6 a.m., got her children up and off to school and proceeded to work. After doing some office work, claimant checked out a car from respondent and went home in respondent's vehicle and had lunch. Claimant proceeded to Ellis in respondent's vehicle, but the family she was supposed to visit was not home. After stopping at a gas station and the home in Ellis a second time, claimant proceeded to Russell for her next home visit.

According to claimant, she felt she was getting a head cold and was not feeling well. While en route to Russell on Interstate 70, claimant's vehicle crossed the median and struck another vehicle. Just prior to the accident, claimant remembered driving, rubbing her forehead, wanting the day to be over and turning on the car fan because it was warm. The next thing claimant remembered was looking at and touching the vehicle's deployed airbags. Claimant indicated she was dazed and confused. She was taken to Hays Medical Center (HMC) for treatment. Claimant fractured several ribs, her right foot and her lumbar spine at L4. She also had surgery to repair a left ankle fracture.

November 5, 2014, notes from Dr. Samantha M. Alsop at HMC indicated claimant remembered getting in the vehicle, but did not remember driving or the accident. Claimant presented with a possible syncopal episode, rib fractures, L4 compression fracture, right foot and left ankle fractures with concern for ligamentous injury. HMC records showed claimant was taking Xanax, Wellbutrin and Adderall and had a past history of attention deficit hyperactivity disorder (ADHD), depression and anxiety. Dr. Alsop's report indicated claimant reported having 5-6 episodes in the past month, but did not specify the nature of the episodes.

HMC notes made by Anissa Sonntag, ARNP, on November 6, 2014, indicated claimant has a past history of ADHD, depression and over the past five to six weeks some episodes of dizziness and weakness and almost presyncopal events. Claimant reported taking Seroquel at bedtime as needed for sleep, but on the morning of the accident did not take her medications or eat breakfast. A toxicology report was positive for amphetamines and benzodiazepines. One assessment of Ms. Sonntag was "Syncopal event, probable *[sic]* related to multiple medications, possibly *[sic]* contributing factors include poor oral intake prior to the accident as well as delayed medication administration."[1]

[1] P.H. Trans., Resp. Ex. A at 3.

Claimant denied having episodes of dizziness in the five to six weeks prior to her accident. She admitted not taking her medications the morning of the accident, but took Adderall and Wellbutrin at lunch. She did not recall if she took Xanax. Claimant testified she had no side effects from Adderall or Wellbutrin, nor would she have side effects if she took her medications at lunch, rather than in the morning. Claimant denied missing breakfast the morning of the accident.

Claimant acknowledged that on the accident date, respondent's vehicle had no mechanical problems, it was a clear day, she did not have the radio on and did not know how the accident occurred. Nor was she writing notes, using a cell phone or texting. Claimant confirmed she reported to HMC personnel she ate green bean dumpling soup, a local German dish, for lunch on the date of the accident.

A Kansas Motor Vehicle Accident Report completed by Trooper J. L. McCord indicated claimant was traveling east on Interstate 70 when her car crossed the median and struck another vehicle. The trooper asked claimant what happened, but she did not know. When Trooper McCord told claimant she was in an accident, she indicated she was not and wanted to know why he was there. The report indicated there was no evidence either driver was impaired.

At the preliminary hearing, the ALJ found it significant that claimant reported dizziness to two different medical providers at HMC on different days. The ALJ stated:

> It is clear that you [claimant] passed out while driving this car. . . . And the question becomes not whether there is a concurrence of risk between your personal risk of passing out and the driving of a car, which is what the Wichita Fence [*Bennett*] case stood for. But in 2011 the Legislature amended the Workers' Compensation Act and said that if an accident or injury arises out of a risk personal to the worker, if you're sick and you pass out and cause an accident, then that does not arise out of and in the course of employment and is [not] compensable.
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> It appears fairly clear from the record before me that this accident was caused by a personal condition of yours, whatever it was, whether it was an oncoming sinus headache, whether it was some reaction to medication, as the nurse practitioner posits, or some other factor, it was something purely personal to you that caused you to lose control of that vehicle and have the accident.
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> And under the 2011 amendment to the Workers' Compensation Act, I am precluded from awarding you benefits under the circumstances. . . .[2]

[2] P.H. Trans. at 43-44.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

K.S.A. 2013 Supp. 44-508(f)(3)(A) provides:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Claimant cites four cases in her letter brief to the Board, including *Bennett*,[5] which was decided prior to the 2011 amendments to the Kansas Workers Compensation Act. Mr. Bennett was sent by Wichita Fence in a company vehicle to make a delivery. On the return trip, Mr. Bennett suffered an epileptic seizure, blacked out and hit a tree. Wichita Fence was aware of Mr. Bennett's condition. The Kansas Court of Appeals found Mr. Bennett's accident arose out of and in the course of his employment, stating:

> Assuming claimant had a seizure and lost consciousness, the fact he was driving the employer's vehicle in the course of his employment subjected him to the additional risk of travel. While the seizure was personal to claimant, the risk of travel arose out of the employment and the two concurred to produce the injuries. *Aetna Finance Co. v. Bourgoin*, 252 Miss. 852, 860-61, 174 So. 2d 495 (1965).
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[3] K.S.A. 2013 Supp. 44-501b(c).

[4] K.S.A. 2013 Supp. 44-508(h).

[5] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

> In the present case, conditions of Bennett's employment (driving the company vehicle), placed Bennett in a position of increased risk. This increased risk provided the necessary causal connection between his injury and his employment. The accident arose "out of" his employment.[6]

In *Stoker*,[7] also cited by claimant, Stoker stated she thought she fell asleep while driving, which resulted in her motor vehicle accident. The Board Member deciding *Stoker* held that losing concentration or falling asleep while driving does not constitute an idiopathic cause within the meaning of K.S.A. 2012 Supp. 44-508(d). In *Stoker*, it was also ruled that losing concentration while driving or driving without the benefit of enough sleep is not a personal risk and is a risk common to and distinctly associated with all employments that require employees to drive vehicles.

In *Roush*,[8] Rent-A-Center was aware Ms. Roush had sleep apnea, but asked her to drive company vehicles. Ms. Roush was driving a company vehicle and either lost concentration or fell asleep and drove off the road into a ditch. She was taking multiple medications for various afflictions, including two medications for sleep apnea. She testified she used a machine at night for her sleep apnea and that she used it the night before the accident. Ms. Roush stated she was prescribed a medication in the morning that made her alert, and she took that medication the morning of her accident. The Board Member deciding *Roush* cited *Bennett*, stating:

> Claimant's description of the injury is that she lost concentration and veered off the road. There is evidence that claimant suffered from and was being treated for sleep apnea. The ambulance attendant record indicates claimant fell asleep while driving. The initial emergency room notes state that claimant fell asleep and drove into a ditch. The Girard Medical Center records also contain a history of claimant falling asleep at the wheel. There are references in the Community Mental Health Center records to whether claimant suffers from sleep apnea or narcolepsy. However, there is no absolute diagnosis of narcolepsy by a physician. The claimant was taking medication for sleep apnea. This Board member finds there is insufficient evidence in the record to find that claimant's accident was related to narcolepsy or sleep apnea.
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> This Board member finds that claimant's losing concentration or falling asleep while driving does not constitute a personal risk or an idiopathic cause within the meaning of K.S.A. 2012 Supp. 44-508(d). Losing concentration while driving or driving without the benefit of enough sleep is a risk common to and distinctly associated with all employments that require employees to drive vehicles.

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[6] *Id.* at 460.

[7] *Stoker v. Dustrol, Inc.*, No. 1,065,785, 2013 WL 6920092 (Kan. WCAB Dec. 5, 2013).

[8] *Roush v. Rent-A-Center, Inc.*, No. 1,062,983, 2013 WL 1876358 (Kan. WCAB Apr. 15, 2013).

Claimant testified she did not know what caused her accident and did not remember what happened. Dr. Alsop indicated claimant had a possible syncopal episode. Ms. Sonntag assessed a syncopal event, probably related to multiple medications, with possible contributing factors including poor oral intake prior to the accident as well as delayed medication administration. The medical evidence is that claimant's accident was caused by a syncopal event. Therefore, claimant's accident did not arise from an idiopathic or unknown cause.

Respondent asserts the case citations relied on by claimant precede the 2011 amendments to the Act, and following the mandates of *Bergstrom*,[9] those authorities are no longer controlling or persuasive. This Board Member disagrees. *Stoker* and *Roush* were decided after the 2011 amendments were enacted. In *Bennett*, the Kansas Court of Appeals noted the fact Mr. Bennett was "driving the employer's vehicle in the course of his employment subjected him to the additional risk of travel."[10] In the present claim, claimant's employment required her to operate a motor vehicle, which is a work risk, not a personal risk. If claimant had not been driving a vehicle as required by her employment, her syncopal episode would not have caused the accident. This Board Member finds claimant's accident was the result of a work risk, not a personal risk.

In summary, this Board Member finds claimant's motor vehicle accident was caused by a syncopal event, not an idiopathic or unknown cause. In this instance, operating a motor vehicle is a work risk, not a personal risk. Claimant proved she sustained a personal injury by accident arising out of and in the course of her employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member reverses the April 2, 2015, preliminary hearing Order and remands this proceeding to the ALJ for further proceedings consistent with the above findings that claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

IT IS SO ORDERED.

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[9] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[10] *Bennett*, 16 Kan. App. 2d at 460.

[11] K.S.A. 2013 Supp. 44-534a.

[12] K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of June, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Bruce E. Moore, Administrative Law Judge